IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 226 of 2005

RAFIUDDIN
V/S
M.C.,JODHPUR & ANR

Mr. RS MANKAD, for the appellant / petitioner

Mr. RS SALUJA, for the respondent

Date of Order : 7.8.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This second appeal has been filed by the plaintiff, in a suit for specific performance, which has been dismissed by both the learned Courts below.

The case of the plaintiff is, that he was in possession of a Haweli near Dalle Khan Ki Chakki in Ghantaghar Jodhpur as tenant for last 85 years. The Municipality proposed a plan to set up a Palika Bazar, for which, this Haweli was required to be got vacated, and therefore, at the request of the authorities of the Municipality, the plaintiff vacated the Haweli, but retained possession of one room. Then on 23.12.81 he was informed vide one letter, that if the plaintiff delivers possession of that room also, he would have been allotted one more shop in the proposed Palika Bazar. This letter was sent by Revenue Officer, and relying upon the assurance of

the Revenue Officer, the plaintiff delivered possession of that room also. However, the assurance was not kept up, and on 11.7.92, an advertisement was published in Jalte Deep for auction of the newly constructed shops, fixing auction between 27 to 31st July 1992. Thereupon the plaintiff filed a suit for injunction, which was registered as suit No.105/92. In that suit an objection was raised about non-compliance of Section 271 of the Municipalities Act, and non-impleadment of Municipality or Municipal Council as party, as the suit was filed against Administrator, Commissioner, and Revenue Officer. In those circumstances, since the litigation on temporary injunction application remained unsuccessful, and in the meantime, shops had been auctioned, that suit was withdrawn on 25.2.95, with liberty to file fresh suit. Inter-alia with these averments, the present suit has been filed on 7.4.98.

The defendants contested the suit by filing written statement, alleging inter-alia, that the plaintiff is already an allottee of shop No.176 in Sardar Market, and that shop was given to the plaintiff in lieu of his having been dispossessed from the Haweli. Once having taken the shop, the plaintiff is not entitled to lay claim to other shops. It was pleaded that entire Haweli was neither with the plaintiff, nor with the plaintiff's ancestors, as tenants, and for whatever possession he had, he has already been allotted shop. Then in para-3 it was pleaded, that the

theory of the plaintiff being in possession of one room and his having delivered possession thereof to the defendant, is all a myth, as had that been so, the plaintiff would have obtained a receipt in that regard. It was also contended, that having failed in the previous suit, the present suit has been filed without any entitlement, and the plaintiff is somehow attempting to grab the shop. It was then contended, that now there is no shop available with the defendants, which could be allotted to the plaintiff. Regarding assurance, giving of assurance was denied, and it was pleaded, that it was never given out to the plaintiff, that he will be given shop in this very area itself. It was also contended, that the plaintiff was never a tenant, there was no justification for allotting any shop to him, nor can he be said to suffer anything, nor the defendants have committed any breach of assurance, or contract. It was then pleaded, that the shops, which were to be allotted in the scheme, had been allotted by draw of lotteries.

The plaintiff then filed a rejoinder, pleading inter-alia, that shop No.176 was never allotted to him, and that he and his ancestors were tenant in the Haweli, and during emergency, a scheme was framed for construction of shops on this place, and in public interest, on assurance of being given two shops, the Haweli was vacated, and only one room was retained by him, accordingly one shop No.136

was allotted to him, and another shop was assured to be given later on, and that the shop allotted in 1976 has nothing to do with the present controversy, as this is a matter of 1981. It was specifically pleaded, that Revenue Officer put a proposal to the plaintiff, which was accepted by the plaintiff, and accordingly, the possession of the room was delivered. Thus, a contract did come into existence, and there is a written contract in this regard, available in the file of the Municipality. It was also pleaded, that many of the shops and land for shops is still lying vacant, and the defendants are liable to allot one shop to the plaintiff, and are estopped from pleading anything contrary to their letter dated 22.12.1981.

The learned trial Court framed four issues. The first was, as to whether the plaintiff had vacated the rented premises in the circumstances mentioned in para-1 and 2 of the plaint, and the defendants, by not allotting the shop in Palika Bazar, have committed breach of the contract. While issue No.2 was, as to whether the plaintiff is entitled to specific performance, and get allotted a shop at Sardar Market, Ghantaghar. Then issue No.3 was, as to whether in view of the plaintiff having been allotted shop No.136, is not entitled to claim any more shop. Then issue No.4 was about relief.

Deciding issue No.1 and 2, the learned trial

Court found, that the plaintiff has failed to prove this issue, as the evidence led by the plaintiff regarding circumstances in para-1 and 2 of the plaint is not only discrepant, rather it demolishes the statement of the plaintiff, apart from the fact, that the plaintiff has not produced all the relevant documents. Then in view of the decision on issue No.1 and 2, the issue No.3 was also decided against the plaintiff. It may be noticed here, that while deciding issue No.4 the learned trial Court also observed, that as a matter of fact the plaintiff should have specifically taken a plea about limitation, but since both the parties have not taken pleading in this regard, it is the duty of the Court to see the question of limitation, which rather should have been seen at the inception, and it was found, that the suit has been filed on the basis of the letter dated 22.12.81, and had filed earlier suit in the year 1992, which was withdrawn in 1995, while the present suit has been filed on 7.4.98, which is clearly barred by time, and therefore, on this ground also, the suit is required to be dismissed. In the result the suit was dismissed.

In appeal, the plaintiff filed an application under Order 41 Rule 27, seeking to produce certified copies of certain documents, which the learned trial Court expected the plaintiff to produce. However, the learned lower Appellate Court has not even decided that

application, and has dismissed the appeal. In the judgment it was observed regarding the documents, that whatever transpires from the documents is, that only a gesture was made, that when new schemes are developed, it is likely that one shop may be allotted, and thus, there was no contract as such. Regarding other aspects covered by issue no. 1 and 2 the learned lower Appellate Court found, that the learned trial Court has discussed the matter in detail on issue No.1 and 2. Regarding Ex.1 and other documents, it was found, that all that happened was, that in the event of shops having constructed in future, matter of allotting second shop shall be considered, which does not tantamount to an agreement, capable of being specifically performed. Then finding on issue No.3 was also affirmed, and on the question of limitation, it was held, that the learned trial Court has rightly found the suit to be barred by time.

It was contended before me, that the learned lower Appellate Court has erred in not deciding the application filed under Order 41 Rule 27. It was contended, that the documents could not be filed earlier, as they were in possession of the defendants, and they were avoiding giving copy to the plaintiff, and as soon as the copies were received, they are being filed, which were required to be taken on record.

In my view, from the perusal of the record of the

appellate Court, it transpires that the application was filed on 5.11.2004, and in the order-sheet dated 10.1.2005 the case was fixed for arguments on the appeal and the application. Thus, the application was understood to be required to be heard and decided alongwith the appeal, but then, even in the judgment of the appeal, the application has not been decided. This of course is an error on the part of the learned lower Appellate Court.

However, in view of the provisions under Order 41 Rule 24, I have taken into consideration the documents produced alongwith the application. Therefrom I find, that one document is the copy of the note-sheet of the Municipality, wherein there is some note in para-67, reciting that the plaintiff was evicted and was made available shop No.136, and the then Administrator has given assurance, that whenever another shop would be available, it would be made available to the plaintiff. However, the then Revenue Officer informed the Administrator that no shop is available for being so allotted. Thereupon the Administrator ordered, that whenever shops are constructed on ring road, one shop may be given to the plaintiff. Accordingly, the demand of shop is made. Suffice it to say, that it is not clear, as to who has prepared this note, and since contents of para-11, which according to this note contain the order of the Administrator, have not been produced, this note by itself is of no consequence, apart

from the fact, that on this note, the order given is to obtain legal advice, and that what is the legal advice received, is not known. It is again a different story, that this note is of the year 1987, while the suit is based on the letter of the year 1981, being dated 22.12.81. At this place, I may refer to Ex.12, which purports to be order-sheets of the file, and purports to contain para-11. Perhaps reference to para-11 as given in para-67, is of this document, and find, that in para-3 thereof, all that is recited is, that during emergency, Haweli No.132 was got vacated, and in lieu thereof shop No.136 was allotted, and at that time, the then Collector-cum-Administrator had told, that presently one shop may be allotted, and subsequently, if one shop is available, that would be given. Then it is reported, that the plaintiff has filed affidavit, deposing to be in possession of one room, and is prepared to vacate, if the Council gives him one shop, and at the same time, it is reported, that no shop is available. I may again observe, that this again is a note-sheet, it is not known as to who prepared it, and what is the basis of the recital made in para-3. Significantly, D.W.1 has clearly deposed, that he does not know as to whether the contents of this part A to B in this para-3 is correct or not. This Ex.12 is a note-sheet, prepared consequent upon the application and affidavit of the plaintiff, which are produced alongwith the application under Order 41 Rule 27, and thus, there is no basis to

attach, any reliability to this recital in Ex.12, in para-3. May be, that in para-7 it was ordered that one shop can be allotted, when new schemes are floated, but then, that by itself does not create any right.

So far the other document produced is concerned, that is an application by the plaintiff being 14/12/81, purporting to enclose the affidavit, and volunteering to vacate, and praying for being allotted the shop. Then the third document is the copy of the affidavit giving out that the Haweli was got vacated during emergency, however, now he is in possession of one room, which he is prepared to vacate upto 31st December 1981, on the condition, that on the establishment of the market, Municipal Council would allot one shop to him. Significantly, even in this affidavit, there is no recital, about one shop have been allotted in lieu of the plaintiff delivering possession of the Haweli, or there being any existing assurance, to allot one more shop, on his vacating the remaining part of the Haweli, or about any assurance having been given to him, at any time, for allotment of two shops, in lieu of the plaintiff's vacating the entire Haweli.

I may pause here and observe, that all these narrations have been made and observed by me only for the purpose of considering the relevance, and bearings of the documents sought to be produced by the plaintiff by

application under Order 41 Rule 27, and in view of the above, I find that these documents have no bearing on the controversy involved in the present litigation, therefore, despite the learned lower Appellate Court committing error in not deciding the application, I am not inclined to take these documents on record.

Coming to the merits of the appeal, it was contended by learned counsel for the appellant, that in view of the fact, that there was clear assurance on the side of the defendant, to allot another shop, and persuaded by that assurance only, the appellant left the possession of the remaining part of the Haweli, it was not open to the defendants to turn round and deny, as such, the suit is liable to be decreed.

I have considered the submission.

At this stage, I may now repeat the observations made by me above, while discussing Ex.12, and find, that it appears, that the plaintiff has been able to simply manipulate. On proper reading of things, as now transpire from collective perusal of the document, produced by the plaintiff alongwith the application under Order 41 Rule 27, read in conjunction with the documents already filed by the plaintiff, is, that it was the plaintiff, who filed the application on 14.12.1981, alongwith affidavit, of his own,

purporting to be ready to leave the possession if the Municipality is prepared to allot another shop, and then the letter is got issued (received by the plaintiff) on 23.12.81, being Ex.1, and on 25.12.81 the plaintiff purports to write Ex.2, and the relevant note-sheet in Ex.12, is consequent upon the plaintiff's application dated 14.12.81 only, and therein there is nothing to lend assurance to the correctness of recitals in para 3, which has been the whole basis of the things brought about. In this background, in view of the discussion made by learned trial Court, on issue No.1 and 2, it is clear, that the plaintiff has come up with the cooked up story, about being in possession of the one room, while his evidence shows an otherwise state of affairs, and this leads me to infer, that the things have been stage managed by the plaintiff, in what manner is better known to the plaintiff.

Thus, I do not find any error in the findings of the learned Courts below on issue no.1 and 2.

Apart from all the above, it is writ large, that even according to the plaintiff, the assurance was given in the year 1981, may be that no time was stipulated for performance, but then even according to the plaint averments, it was in the year 1992, that the defendants denied to stand by the alleged assurance, and not only advertised the shops for being auctioned, even in the

plaintiff's suit filed in the year 1992, they contested the plaintiff's rights, and the interim injunction application was got dismissed, which dismissal was upheld by the Appellate Court also. In these circumstances, when the defendants contested the suit, and opposed the prayer of the plaintiff for temporary injunction, it had become clear that the defendants have denied to perform their part of the contract, and in view of the provisions of Article 54 of the Limitation Act, the suit was required to be filed within three years from that date, as against which the suit has been filed as late as in the year 1998, which is clearly barred by time, and in view of the provisions of Section 3 of the Limitation Act, it is the duty of the Court, irrespective of the fact, as to whether, the limitation has been set up as a defense or not, to see, as to whether the suit is within time or not. In that view of the matter, I concur with the findings of the learned Courts below about the suit being barred by time as well.

The net result is that the appeal does not involve any substantial question of law and has no force as well. The same is, therefore, dismissed summarily.

(N P GUPTA),J.

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